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IN THE
COURT OF APPEALS OF INDIANA

ALEXANDER ANTONIO LOPEZ,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 82A01-0512-CR-542
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE VANDERBURGH SUPERIOR COURT
The Honorable Robert J. Pigman, Judge
Cause No. 82D02-0502-FB-90

August 25, 2006

MEMORANDUM DECISION - NOT FOR PUBLICATION

MAY, Judge

Alexander Antonio Lopez appeals his convictions after a jury trial of dealing in cocaine, a Class B felony,[1] and possession of cocaine, a Class C felony.[2] We find the statements he gave police were voluntary; he was not prejudiced by the trial court's failure to give him a continuance to refresh a witness' recollection, because that witness was allowed to testify later after refreshing his recollection; and the discovery violations he alleged did not deprive him of a fair trial. We accordingly affirm his convictions.

FACTS

On February 1, 2005, Evansville Police Officer Todd Seibert stopped the vehicle Lopez was driving. Lopez told Officer Seibert he did not have a driver's license, and Officer Seibert arrested him. The car Lopez was driving belonged to his girlfriend, Karri Olmstead, and officers went to her home to tell her that her car was being towed.

When officers arrived at Olmstead's home, they smelled marijuana smoke. They asked for and received permission to search the premises. Officers found a digital scale, what appeared to be cocaine and marijuana, and a gun. Olmstead was arrested and taken to police headquarters for questioning. Lopez was also taken to police headquarters and questioned. Lopez admitted the digital scale, the cocaine, and the gun belonged to him.

[1] Ind. Code § 35-48-4-1.
[2] Ind. Code § 35-48-4-6.

DISCUSSION AND DECISION

1. Motion to Suppress

Lopez argues the denial of his motion to suppress his statements was improper, as the State did not read him his *Miranda* rights. He also argues his tape-recorded statement was not given voluntarily. We disagree.

Officer Kurt Althoff testified he read Lopez his *Miranda* rights within minutes of first meeting him at the scene when Lopez was arrested. He testified Lopez understood his rights. Lopez was transported to police headquarters to be booked, where he overheard police officers Corbin and Hunt discussing the digital scale found at Olmstead's home. Lopez interrupted them and said the scales were his but they did not work. Later, as officers were discussing the handgun, Lopez again interrupted and told the officers the gun was not loaded.

Lopez's statements were not in response to questions by officers. As such, they were not subject to *Miranda*. *White v. State*, 772 N.E.2d 408, 412 (Ind. 2002) (*Miranda* applies only to custodial interrogation and a "volunteered" statement is not made in response to interrogation). Those statements were therefore properly admitted into evidence regardless of whether Lopez had been given *Miranda* warnings.

Lopez also gave a tape-recorded statement at police headquarters. He notes there is no written *Miranda* waiver[3] and asserts there is a discrepancy in the evidence as to

[3] A written waiver of rights is not dispositive of whether a defendant's statement is voluntary. *Johnson v. State*, 829 N.E.2d 44, 50 (Ind. Ct. App. 2005), *trans. denied* 841 N.E.2d 182 (Ind. 2005).

whether he was given his *Miranda* rights. Therefore, he argues, the State failed to prove his statement was voluntarily given.

A statement is voluntary so long as it is not induced by violence, threats, or other improper influences that overcome the defendant's free will. *Lichti v. State*, 827 N.E.2d 82, 94 (Ind. Ct. App. 2005), *aff'd in relevant part and vacated in part,* 835 N.E.2d 478 (Ind. 2005). Whether a statement is voluntary is determined from a consideration of the totality of the circumstances surrounding the making of the statement. *Hill v. State*, 825 N.E.2d 432, 437 (Ind. Ct. App. 2005).

The evidentiary discrepancy on which Lopez relies arose out of testimony by Officer Darren Baumberger. The officer testified at a hearing to determine whether Lopez required an interpreter that he had not advised Lopez of his rights. But at the hearing on the motion to suppress, Officer Baumberger testified he had read Lopez his *Miranda* rights at police headquarters before questioning him. The officer explained he had not read his notes prior to the interpreter hearing, but he had read them prior to the suppression hearing. Officer Althoff testified Officer Baumberger gave Lopez his *Miranda* rights at headquarters.

Lopez's argument amounts to a request that we reweigh the evidence and judge the credibility of the witnesses. That we will not do.

Lopez next claims the police coerced his statement with promises to assist him with a lesser sentence. Coercive police activity is a prerequisite to a finding that a defendant's statement is not voluntary. *Bailey v. State*, 763 N.E.2d 998, 1003 (Ind. 2002). Police discussed the possibility of leniency if Lopez would provide information

about his source, but there were no promises of leniency. A vague assurance of possible aid does not amount to a promise of leniency that might render a statement involuntary. *See Turner v. State*, 682 N.E.2d 491, 495 (Ind. 1997) (statement by police that Turner would help himself by giving a statement was not a promise of leniency). Lopez's statement was not involuntary and the trial court did not abuse its discretion when it denied Lopez's motion to suppress.

2. Refusal of Recess

Lopez cross-examined Officer Althoff about Olmstead's statement and Officer Althoff responded a number of times he did not recall the specifics of the statement. Lopez requested a recess so Officer Althoff could refresh his recollection by listening to the statement. The trial court denied Lopez's request.

Lopez argues "[t]he court should have permitted [Officer Althoff] to refresh his recollection so that he could responsibly and accurately answer the defense's cross examination questions." (Br. of Appellant at 13.) We need not address whether the trial court erred in declining to allow a recess for the officer to refresh his recollection, as any error was harmless.

Olmstead testified about the statement she gave Officer Althoff, and the statement was played to the jury. Officer Althoff was called to the stand by Lopez and questioned regarding the contents of Olmstead's taped statements. Because Lopez was able to question Officer Althoff about the taped statement, the denial of a recess did not deprive Lopez of the right to confront witnesses and elicit testimony. *See Mitchell v. State*, 535

N.E.2d 498, 502-03 (Ind. 1989) (no prejudice where defendant elicited the same testimony he claimed he was prohibited from eliciting earlier), *reh'g denied*.

3. Violation of Discovery Rules

Lopez's trial began June 27, 2005. During the trial, Lopez discovered the State had a tape recording of the statement he had given the police. Lopez had requested discovery from the State but had not received this statement, so he moved for a mistrial. The trial court implicitly denied Lopez's motion for mistrial by continuing the trial until July 18, 2005.

One of the remedies for late-provided evidence is a continuance. *See, e.g., Fosha v. State*, 747 N.E.2d 549, 554 (Ind. 2001) (where there is failure to comply with discovery procedures, the trial judge is usually in the best position to determine whether any resulting harm can be eliminated or satisfactorily alleviated; where remedial measures are warranted, a continuance is usually the proper remedy). Lopez was given an additional two weeks to prepare and he used that time to his benefit by filing a motion to suppress the tape recording. Lopez has not demonstrated any prejudice from the late discovery of the tape recording.

Lopez also contends Olmstead's testimony, after a question from a juror about the results of a drug test she had taken, was a violation of discovery. However, the record reflects the State did not have those drug test results. Olmstead was represented by her own counsel, and Lopez could presumably have requested those documents from her. Because Lopez could have discovered that drug test evidence with the exercise of reasonable diligence, there is no discovery violation. *See Badelle v. State*, 754 N.E.2d

510, 530 (Ind. Ct. App. 2001) (information available to trial counsel through "reasonable diligence" is not "suppressed"), *trans. denied* 761 N.E.2d 423 (Ind. 2001).

Lopez was not prejudiced by discovery violations. We accordingly affirm his convictions.

Affirmed.

SULLIVAN, J., and BAKER, J., concur.